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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

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|-------------------------------|---|---------------------|
| SOFIE KARASEK, ET AL., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| VS. |) | NO. CV 15-03717-WHO |
| |) | |
| THE REGENTS OF THE UNIVERSITY |) | |
| OF CALIFORNIA, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

San Francisco, California
Wednesday, June 22, 2016

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

THE ZALKIN LAW FIRM, P.C.
12555 High Bluff Drive - Suite 301
San Diego, CA 92130

BY: IRWIN M. ZALKIN, ESQUIRE

For Defendant:

MUNGER, TOLLES & OLSON, LLP
560 Mission Street - 27th Floor
San Francisco, CA 94105

BY: JESLYN A. EVERITT, ESQUIRE

MUNGER, TOLLES & OLSON, LLP
355 S. Grand Avenue - 35th Floor
Los Angeles, CA 90071

BY: BRADLEY S. PHILLIPS, ESQUIRE

Reported By:

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
Official Reporter

Wednesday - June 22, 2016

2:08 p.m.

P R O C E E D I N G S

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THE CLERK: Calling CV 15-3717, Karasek, et al., vs. Regents of the University of California, et al.

Counsel, please come forward and state your appearance.

MR. ZALKIN: Good afternoon, Your Honor. Irwin Zalkin for the plaintiffs.

THE COURT: Mr. Zalkin.

MS. EVERITT: Good afternoon, Your Honor. Jeslyn Everitt for the Regents of the University of California.

MR. PHILLIPS: Good afternoon, Your Honor. Brad Phillips, also on behalf of the Regents.

THE COURT: Good afternoon. All right.

So whoever -- why don't you come back up here. I think, Ms. Everitt, if you're going to be arguing and Mr. Zalkin.

Let me tell you my reaction to where we are at the moment. I allowed discovery so that Ms. Karasek and Ms. Commins could find out what UC did in response to the sexual assaults that they suffered while at school, and that I needed to do that I think points to a deficiency in the way that UC responded to their internal complaint, and a failure to communicate with students when they're at their most vulnerable is a problem. I consider it a serious failing in UC's response, but by itself, it's not deliberate indifference.

1 So the issue that I'm interested in in this argument is
2 whether that and the other allegations in the Third Amended
3 Complaint, if established, plausibly show deliberate
4 indifference. That's an exacting standard, Mr. Zalkin. I
5 don't think Ms. Karasek and Ms. Commins have met that burden.

6 The facts, as I understand it, with respect to Ms. Karasek
7 are that once the complaint was brought to their attention,
8 they spoke with TH, they investigated this and other assaults,
9 found ultimately that he violated school policy, and UC imposed
10 discipline.

11 The fact that it was an informal as opposed to a formal
12 process doesn't establish deliberate indifference. The fact
13 that it took six months over the summertime doesn't establish
14 deliberate indifference. And the result was not so off the
15 mark that it might have been a different -- you could have come
16 to a number of different results, but that result was not so
17 off the mark that it establishes deliberate indifference, all
18 of those things being put together, and he did not re-offend.

19 With respect to Ms. Commins, UC suspended John Doe 2 in
20 some form, acted before Ms. Commins' complaint, and then
21 imposed the two-year suspension. The delay of 13 months
22 occurred as a result of the criminal proceedings that were
23 going on. I think you put those things together, that doesn't
24 make deliberate indifference.

25 You can't rely on the *Dear Colleague* letter to establish

1 deliberate indifference. The letter applies first only with
2 respect to injunctive relief. It lists a number of things
3 which matter a lot with respect to a policy, but actual
4 knowledge and deliberate indifference are what's required.

5 And so you look at -- I think this is a case that's very
6 different than the *Takla* case where UCLA violated its own
7 policy by using the early resolution program, discouraging the
8 filing of a request for a more formal investigation, failing to
9 document the process, making no findings. And it's much more
10 like *Oden* and *Ha*, and there is nothing here to plausibly allege
11 that UC deliberately attempted to sabotage the complaint or its
12 orderly resolution.

13 So those are my problems with and my inclinations with
14 respect to deliberate indifference. I don't think causation is
15 an argument that I'm interested in, but I do think deliberate
16 indifference is the one that you need to focus on.

17 **MR. ZALKIN:** Thank you, Your Honor.

18 Let me just start by indicating that in measuring the
19 level of indifference, we have to look at what is the
20 overarching policy of Title IX, and that is for the University,
21 when it receives a report of sexual assault, to engage in a
22 prompt and equitable process of investigation and resolution.

23 And we've looked at some of the measures of what that is.
24 The *Davis* Supreme Court said that they have to act -- you have
25 deliberate indifference if they act clearly unreasonably under

1 all of the known circumstances. And then you have the *Oden*
2 standard which says that their conduct has to be something more
3 than just negligent. It has to, in effect, be a deliberate
4 interference with the process.

5 And in this case, you have, I think, both. I think you
6 have -- certainly an inequitable treatment of the victims as
7 compared to the attention that was given to the well-being of
8 the assailants in both instances, and you have a focus in both
9 instances on something other than the investigation of the
10 allegations that were made by both of these women.

11 So, for example, in the Karasek circumstance, the focus
12 initially was on the California Democrats Club and whether the
13 California Democrats Club could expel her assailant from the
14 club. So we have -- and I'm going to take you through the
15 timeline. I think when you do that, you really see how this
16 unfolds and how it is a deliberate decision not to address what
17 they needed to address timely and responsibly and equitably.

18 So we have a new record, and I've got to apologize
19 because -- and I did tell counsel, in preparing for this
20 argument, we came across a record in the mounds of records that
21 were given to us that were not in any particular order, a
22 document that is dated February 14th, 2012, and it's an
23 intake -- it's intake notes from the Office of Gender Equity
24 Resource Center, and it's from Christine Ambrosio, who is a
25 member or administrator of that agency.

1 And so as of December 14th, 2012, the University had
2 actual knowledge of the sexual assault on Ms. Karasek. The
3 document spells out what happened to her. It has her name in
4 here as one of the persons who had been assaulted by this man,
5 by this student. They identify it as sexual assault, and they
6 give notice or she gives notice, Ms. Ambrosio, to the Title IX
7 office, among other offices, that this has occurred, and she's
8 also advised that there were other women, at least two other
9 women, who reported similar conduct by this assailant.

10 What is her response? Her response is not at all to reach
11 out to the victim, Ms. Karasek. Her response is to send an
12 email to various administrators saying, *The president of the*
13 *Democrats Club*, which is a student, *wants to expel this*
14 *assailant, this perpetrator. I'm not sure we can do that. I*
15 *think we might have to engage in some other form of resolution*
16 *like this Transformative Justice Model or using something like*
17 *that.*

18 And there's this discussion that goes on about what to do
19 with this guy. And the Title IX officer, Denise Oldham,
20 responds in an email of February 15th saying, *Hold on. The*
21 *guidelines, the DOE guidelines, the most recent ones, which*
22 *must be the DCL, state you can't engage in this kind of*
23 *informal process when it comes to sexual assault cases. We*
24 *can't do that.*

25 Ms. Oldham doesn't reach out to this victim, to

1 Ms. Karasek. There is no communication with Ms. Karasek until
2 she and three, now, other victims -- because there was a
3 subsequent assault even after this report -- until these
4 victims reach out to the Gender Equity Office and they want to
5 have a meeting to talk about this. And a meeting is held on
6 April 20th with Ms. Karasek -- where Ms. Karasek attends that
7 and three of the other victims attend that. That's with
8 Ms. Oldham and that's with Hallie Hunt, the Director of the
9 Center for Student Conduct.

10 Now, at this meeting, Ms. Karasek is not told about what
11 her Title IX rights are. She's not told that in fact in order
12 to initiate a Title IX investigation, she needs to submit a
13 written statement. She's not told any of that.

14 In fact, what occurs are more conversations and
15 communications with the president, who is a student of the
16 Democrats Club, now concerned about the summer program that's
17 going -- that they're going to have where they do an internship
18 called Cal at the Capital, and this guy might be part of that
19 and how do they deal with that. That's what they're talking
20 about.

21 In the meantime, Ms. Karasek is out here. Nothing is
22 happening for her. No accommodations are given to her. Yes,
23 they did tell the student president, you know, you can tell her
24 or tell these victims they can go to the Student Health or some
25 other Rape Center or something and get some assistance. But

1 they do nothing that would be consistent with what Title IX
2 requires for that period of time, from February to April 20th,
3 from February 14th, at the minimum, to April 20th. That's two
4 months. Nothing's happening.

5 Then what does happen? So on May 15th, Ms. Karasek does
6 submit a written statement. It so happens that on May 14th,
7 Dr. Glenn DeGuzman, who is the Assistant Director of the Center
8 for Student Conduct, meets with the assailant.

9 Now, he's not meeting with him, according to his own
10 records, for the purpose of investigating. In fact, he says
11 that he is not going to investigate. He wants to work on
12 rehabilitation and counseling of this victim.

13 So they're not addressing in an investigatory sense what
14 happened to Ms. Karasek, what they should do about what
15 happened to Ms. Karasek, what Ms. Karasek's needs might be.
16 They're worried -- they want to get this guy rehabilitated, and
17 they're going to focus in on that, and that's what they focus
18 in on for months -- for months. And he's communicating to the
19 Title IX officer, DeGuzman is. She is communicating to the
20 students -- the student president of the Democrats Club, which,
21 in my mind, might even violate FERPA. I'm not even sure how
22 she has the right to be giving information to this other
23 student.

24 My client is out in the cold, is being ignored, is not
25 being addressed, a sex assault victim who's been traumatized.

1 This is not -- I mean, if this were a case of a student who had
2 assaulted with -- say, a white student assaulted a black
3 student with a knife and this was this kind of an assault, you
4 bet there would be workup. There would be investigation up the
5 gazoo.

6 But this is a sexual violence case against a woman. No
7 big deal, which is the history. If you look at our Complaint,
8 we've alleged that there were -- in 2013, there were 14 sex
9 assault claims and reports made that were dealt with in this
10 informal way. No formal hearings, no formal processes, no
11 opportunity to put on any kind of evidence, make statements, be
12 heard for what happened to her, at least be heard. None of
13 that.

14 This is a pattern and practice. The Karasek case and the
15 Commins case are just two more of the same.

16 So it's not until October 24th -- or actually -- it's
17 actually on October 1st, 2012 -- all right. This is somewhat
18 eight months later -- that the Title IX officer determines on
19 her own that there will be no informal proceeding, no formal
20 investigation, and instructs Dr. DeGuzman to prepare an
21 administrative disposition letter. And he negotiates that
22 letter. He actually engages in a negotiation with the
23 perpetrator over what should be included in that disposition.

24 And in that disposition, he was -- it's a slap on the
25 wrist. He gets one consultation with a licensed mental health

1 practitioner of his choice; one appointment with an alcohol and
2 other drug counselor in Social Services at the Tang Center; and
3 another drug counselor in Social Services at the Tang Center;
4 and a requirement initially -- initially Dr. DeGuzman wanted a
5 requirement that he at least talk to this Allan Creighton
6 health educator to, quote, *check in regarding gender issues and*
7 *sexual misconduct*, close quote.

8 The perpetrator negotiates that last requirement away, so
9 ultimately the ultimate determination or ultimate disposition
10 letter excludes the very problem that this guy was in trouble
11 for, excludes that from the disposition.

12 I don't know how you can look at that, Your Honor, and say
13 that this wasn't a deliberate indifference to this woman, to
14 this victim. Everything they did was deliberate, not accident,
15 not carelessness, not negligence, not laziness, as the *Oden*
16 court would indicate, but deliberate.

17 And in the meantime, when my client does try to find out
18 what happened, they're not giving her the full story. They
19 share and they give the perpetrator the final disposition, but
20 they don't even bother to give it to the victim.

21 This is absolutely incredible, to ignore a sexual assault
22 victim who's been traumatized, who is scared, who is fearful,
23 who is scared to be -- that she's going to run into this guy in
24 school, sees him in school and has to take a different route.
25 That's not indifference? I don't know what indifference is,

1 Your Honor, if that's not indifference.

2 The complete inequitable treatment where you're spending
3 time in favoring and finding counseling and helping this poor
4 assailant who now sees the error of his ways -- there were four
5 women. This is not a guy who just abused one woman. This is a
6 guy who abused four women, and he's not even going to get any
7 sex education out of it. That's indifference.

8 Let me talk about Nicoletta Commins. So Ms. Commins was
9 sexually assaulted in January 2012, and it was a vicious
10 assault by a vicious guy. Her perpetrator had beat up two
11 other students, fraternity students, one of whom ended up going
12 to the hospital.

13 Police were called in. She made a report immediately. A
14 rape kit was taken. The school was on notice at least as of
15 January 31st. The assault occurred on the 20th. They were
16 probably on notice sooner than that because I assume the
17 Berkeley police would have advised the University. But even if
18 they didn't, at least on January 31st we know they were on
19 notice because they issued this Notice of Interim Suspension as
20 a result of what he did at the fraternity and what he did to
21 Ms. Commins.

22 And at that point, they kicked -- they said he was
23 restricted from coming to campus at all. At all. That was --
24 I would have agreed with that, but then he lawyers-up. They
25 have a hearing on February 3rd, and now he's no longer

1 restricted from coming on campus. He now can come to campus
2 and he can go to classes and he's got this so-called
3 five-minute window to get there, to get back. Nobody's
4 monitoring that. Who knows if this -- nobody tells her --
5 nobody tells her that he might be on campus. Nobody tells her,
6 you know, these are the routes he might be taking. Nobody lets
7 her know. They don't issue a no-contact order of any kind to
8 him.

9 Interestingly enough, on August 25th, 2015, Exhibit No. E
10 to the reply, they -- No. D, I'm sorry. Letter D -- no. It is
11 E. In E, they lay out a no-contact order when they're
12 thinking about bringing -- when they want to bring him back.
13 In Exhibit E, they lay out a no-contact order that is
14 extensive. They say in that one, "You may not contact or
15 communicate with Ms. Commins through any means or media,
16 including, but not limited to contact in person via phone,
17 messaging, social media, or through other people, including
18 counsel." Including counsel.

19 They didn't do that while he was still in school, while he
20 was taking classes, while he got to finish his semester and
21 she's at school at the same time. She doesn't know where he
22 is, she doesn't know what route he's taking, she doesn't know
23 when he's on campus, none of that. She's exposed to further
24 harassment under the *Davis* standard. She's vulnerable to it.

25 And, in fact --

1 **THE COURT:** Mr. Zalkin, I appreciate this chronology,
2 which I've read in the papers. My problem is that I think the
3 cases don't support the finding of deliberate indifference.

4 So I'm interested in your argument on the cases, and
5 particularly what you've been arguing attacks the conclusions
6 that the University came to. The cases that have found
7 Title IX violations were basically ones where the school didn't
8 act, didn't investigate, didn't do anything. So I'm interested
9 in what case you would point me to.

10 I told you at the beginning, I'm not -- I am unhappy that
11 the University wasn't communicating with your clients, and I
12 think I consider it a deficiency in UC's policy, but I didn't
13 see any cases that said failure to communicate reaches the
14 deliberate indifference standard. So if you could focus on
15 that, that would be helpful.

16 **MR. ZALKIN:** I can't tell you of a particular case
17 where there was a failure to communicate with the victim that I
18 can think of off the top of my head. I mean, that's clearly
19 within the DCL, and as we have repeatedly said, the DCL is a
20 point of reference. It doesn't carry with it the force of law,
21 but it is an important point of reference because these schools
22 are held to those standards for their funding purposes. So why
23 should it be really any different as a measure of what would be
24 responsible conduct on the part of the school.

25 **THE COURT:** I understand what your argument is --

1 **MR. ZALKIN:** I can't tell you of a case specifically
2 where there is a failure to communicate, but, for example, one
3 of the arguments the defendant makes is that they delayed in
4 their investigation --

5 **THE COURT:** Before you get there, could you answer my
6 question?

7 **MR. ZALKIN:** I will give you the case authority.

8 **THE COURT:** Give me the case or cases that I should be
9 paying most attention to.

10 **MR. ZALKIN:** I'm going to give you a list of cases --

11 **THE COURT:** Don't give me a list. Give me something
12 that really -- you're strongest case, because I've read all of
13 the cases.

14 **MR. ZALKIN:** I think one case that is very strong is
15 *Williams vs. the Board of Regents of the University System of*
16 *Georgia.*

17 So one of the arguments like, for example, in the Commins
18 case that the defendant is making is that they -- and they
19 pressured her to allow them to delay doing any investigation
20 until the resolution of the criminal proceeding against the
21 plaintiff -- the assailant in that case. All right. That took
22 up almost a year or close to it. That was delayed.

23 And in *Williams vs. the Board of Regents*, the defendants
24 in that case, the University, that was a case of gang rape.
25 Three guys --

1 **THE COURT:** It was a horrific, horrific fact
2 situation.

3 **MR. ZALKIN:** Horrible case.

4 But they made the same argument for the reason -- the
5 reason for the delay in the University's investigation was
6 premised on the fact that they wanted to defer and felt they
7 should defer to the criminal proceedings, and the Court in
8 *Williams* said that the pending criminal charges did not affect
9 UGA's ability to institute its own procedure.

10 Criminal charges were an ineffectual means to prevent
11 future attacks at UGA while the charges were pending, and the
12 disciplinary proceedings were not instituted for another four
13 months after Brandon Williams' acquittal and the dismissal of
14 charges against Cole and Thomas.

15 That's very similar to what happened in Ms. Commins case.
16 They withheld their investigation until October 5th when the
17 criminal proceedings -- when he had finally been convicted or
18 took a charge, took a plea, and then they waited four months to
19 do their -- if you call it an investigation, an investigation
20 of any sort, and issue one of these disciplinary --
21 administrative disciplinary orders.

22 So that's an example of where a court has found that a
23 delay based on the very argument that defendants are making in
24 this case, in the Commins circumstance, was in some way
25 reasonable because of the pending criminal thing.

1 **THE COURT:** Now give me your best case for
2 Ms. Karasek.

3 **MR. ZALKIN:** Okay. So with Ms. Karasek, you have
4 several, sort of, cases -- well, I think to some extent, you
5 have the -- there's a case called *Doe vs. School Administration*
6 *District No. 19* -- it's 66 F.Supp.2d 57 -- where they find
7 deliberate indifference for engaging in this informal
8 investigative process. This is where a teacher is told to go
9 talk to the students who are accusing her, I believe, of
10 engaging in some kind of --

11 **THE COURT:** Is this the teacher-on-student case?

12 **MR. ZALKIN:** Yes.

13 **THE COURT:** I thought none of those -- the high school
14 cases that you cited, all the different Doe cases were remotely
15 close to this situation. And that one certainly wasn't. So --

16 **MR. ZALKIN:** Well, I mean, I don't know -- those are
17 the cases that exist that we could find.

18 **THE COURT:** Okay.

19 **MR. ZALKIN:** That's part of the problem, Your Honor,
20 in why it's important to look to the DCL because you have
21 this -- you have these ad hoc opinions all over the place in
22 these Title IX cases that aren't -- there's not a lot of
23 consistency because, you know, courts are just looking at it
24 and saying *well, this is what I think, this is what I think.*
25 And there's not -- there's not this kind of uniformity.

1 But that's why I keep harping back to saying let's look at
2 something that, number one, the U.S. Supreme Court has looked
3 at for guidance, the OCRs, the predecessor of the DCL, the
4 OCR's document on sexual harassment, guidance document on
5 sexual harassment.

6 There are cases where the courts have in fact -- let me
7 give you those cases -- looked to the DCL. For example, in
8 *Lopez vs. The Regents of the University of California*, the
9 Court actually considered the DCL's reference to sexual assault
10 and rape, whether that could include domestic violence --
11 whether that would include domestic violence. And so it turned
12 to the DCL for guidance.

13 In *Mansourian vs. The Regents of the University*
14 *California*, at 602 F.3d 957 and the particular areas you want
15 to look at is at page 965, it's a 2010 case, where the Court
16 looked to the OCR's 1979 policy interpretation guidance
17 document. In fact, that was deemed a significant guidance
18 document, just like the DCL in its analysis of whether the
19 exclusion of women from the wrestling team violated Title IX.
20 So it looked to that for the guidance.

21 So I don't have for you a case exactly on point to
22 Ms. Karasek's case, but I can cite you to the DCL where it
23 violated almost everything that the Office of Civil Rights or
24 the Department of Education -- whose very purpose is to
25 interpret and enforce that Title IX, at least on the

1 administrative level.

2 So it is not -- doesn't carry the force of law, but it is
3 a significant reference that does create some sense of
4 uniformity when we look at these cases and we look at the
5 conduct of these universities and how they should respond to
6 sexual assault cases.

7 So I can't tell you specifically, but I just think the --
8 on the facts, a reasonable jury listening to those facts,
9 listening to the arguments on those facts and what it means,
10 could very well find that this was deliberate indifference. I
11 don't think you can say that as a matter of law, reasonable
12 minds can't differ. And I think that's what you're saying, and
13 I hope you change your mind.

14 **THE COURT:** Okay. Thank you.

15 Ms. Everitt.

16 **MS. EVERITT:** Thank you, Your Honor.

17 To start with the failure to communicate point, as
18 Your Honor noted, we have looked at the case law. We have
19 failed to identify a single case that has found deliberate
20 indifference based on a failure to inform or a failure to
21 communicate theory.

22 With respect to *Doe vs. School Administration District 19*,
23 that was a case where the school never confronted the assailant
24 about the investigation and never conducted an investigation,
25 including speaking with any student, so the facts there are far

1 from the facts here where the school did conduct an
2 investigation and promptly notified the assailant about the
3 claims of sexual assault and it did discipline the assailant.

4 One reason why we might not see deliberate indifference
5 met for failure to inform is that Title IX is about stopping
6 harassment that deprives students of educational benefits, not
7 necessarily about telling students what's happening. And
8 schools, as we note in our opening brief, are also restricted
9 in what information they can provide to students, both by
10 FERPA, which protects the students. In this case, both
11 students -- both assailants, in the case of Ms. Karasek and in
12 the case of Ms. Commins, were students, and so they're FERPA
13 concerns and also due process concerns for the due process
14 rights of those assailants.

15 Secondly, neither Ms. Karasek nor Ms. Commins requested
16 any information, so it's important to look not just at the
17 allegations in the Complaint but what the Complaint does not
18 allege, and here had Ms. Karasek or Ms. Commins come forward
19 and requested specific information and the University failed to
20 respond, perhaps we would be in a different factual setting,
21 but there is no allegations that this information was at all
22 requested or that the University ignored requests by
23 plaintiffs.

24 **THE COURT:** Maybe you can help me here. I find it
25 very troubling that the University at the time that these women

1 were at the height of their vulnerability after those
2 assaults -- that the University didn't take care, that they
3 didn't communicate in any real way what was going on.

4 Now, I may have missed it; maybe they did. And it's a
5 separate question, I think, from deliberate indifference,
6 although it does play a piece in my analysis.

7 So what's your response?

8 **MS. EVERITT:** Two responses, Your Honor.

9 First of all, as a factual matter, the University did
10 correspond with the plaintiffs to a certain degree. So, for
11 example, with Ms. Commins, the UC administrator spoke with
12 Ms. Commins in February and April of 2012. February 2012, I
13 believe, was just a week after she filed her Complaint.

14 And then they took into account her recommendation for
15 sanctions that included excluding her assailant from campus
16 until she was no longer on campus and notified her when this --
17 of the sanctions when the case concluded. I believe that was
18 in October/November time frame.

19 And there was one, I guess, email in the March time frame
20 that Ms. Commins says she didn't receive because it was sent to
21 an alternate email account. Even there, as soon as Ms. Commins
22 followed up and requested additional information from the
23 University, the University responded the next day.

24 For Ms. Karasek, the Complaint alleges that UC
25 administrators were, quote, *continually in contact with the Cal*

1 *Democrats Club*. Now, that makes sense because, as Your Honor
2 is aware, there is four students that all came forward
3 together, part of the Cal Dems Club, to report assault by this
4 particular individual, and so the primary point of contact, at
5 least early on, was these leaders of the Cal Dems club. And
6 Ms. Karasek alleges that she then received information from the
7 Cal Dems club.

8 So if there had been additional information that
9 Ms. Karasek had sought, she could have gone to the University
10 and personally requested that information, but we can infer
11 from the information that she was being provided or from the
12 fact that she did not follow up and request additional
13 information that she was satisfied with the University's
14 correspondence.

15 In addition, Ms. Karasek was informed of the final outcome
16 of the sanctions, and, again, the Third Amended Complaint said
17 that Ms. Karasek did not request an update from the University
18 until November 5th, 2012, and she received a response the next
19 day.

20 So as a factual matter, even assuming all the facts in the
21 Complaint are true and construed in favor of plaintiffs, there
22 was information being provided to these students. The students
23 never requested additional information, and if they had, we
24 would have every reason to believe that the University would
25 have promptly responded.

1 **THE COURT:** So just my footnote on this. The
2 University could have done much better by these women.

3 Go ahead with your argument.

4 **MS. EVERITT:** Noted, Your Honor.

5 And I think that the second point I was going to make with
6 respect to this is just the high standard for deliberate
7 indifference, and so that it requires more than mere
8 carelessness or laziness, and the Supreme Court is clear that
9 we -- through the deliberate indifference standard, is not
10 looking to penalize individual employees for their inaction.
11 It's looking for an official decision not to remedy the
12 situation.

13 And so here there's no facts that support the school as a
14 whole taking an official decision to not inform the plaintiffs
15 or to remedy the situation. Far to the contrary, the school
16 took immediate corrective measures and in fact did remedy the
17 situation. Thus, as Your Honor noted, neither of the
18 assailants re-offended after the school took action.

19 So with respect to -- I wanted to comment briefly on the
20 document that Mr. Zalkin said that he discovered that changed
21 his analysis showing -- with respect to February 2012 being the
22 date of notice. I have a copy if Your Honor is interested.
23 Again, it does not change the calculation.

24 **THE COURT:** I think I read the -- I know that I read
25 the follow-on email that Mr. Zalkin referred to. It was

1 attached to somebody's pleadings, so --

2 **MS. EVERITT:** And it's the same language that appears.
3 It's Exhibit A to our Request for Judicial Notice, and what it
4 shows is to the extent that the University was aware of
5 anything in February of 2012, it was unclear what specifics
6 were provided about whether they even had the assailant's name
7 at that time and if they even knew any of the allegations apart
8 from the secondhand account, and it wasn't until April 2012
9 that Ms. Karasek came forward and formally lodged a complaint,
10 and the University immediately took corrective action at that
11 time.

12 And even with respect to the 2000 -- the February 2012
13 date, as Exhibit A makes clear, the University followed up
14 immediately. Ms. Ambrosio at the Center for Gender Equity
15 e-mailed administrators at Title IX and at the Center for
16 Student Conduct about what she had met with the student about,
17 and both of those administrators offered to follow up with the
18 student, so then it was on the Cal Dems to convey that
19 information to the victim here, Ms. Karasek, and so that would
20 be the reason for any delay during that time period.

21 So Mr. Zalkin as well discussed the remedy being
22 insufficient, and I just wanted to touch briefly on that. Here
23 the remedy -- there is no allegation that the discipline failed
24 to remedy the situation, and as Your Honor is aware, courts are
25 not entitled to second guess decisions made by the University.

1 And so here the University did take prompt corrective action.
2 It found that both assailants violated the University policy
3 and it did impose discipline on both assailants.

4 And as the Supreme Court has held, Title IX does not
5 require recipients to purge their schools of actual peer
6 harassment or to engage in a particular disciplinary action.

7 I guess to conclude, just to go quickly through the
8 timeline, yeah, as Your Honor is aware, in all cases here, the
9 University took prompt corrective action and met immediately
10 with the assailant and investigated the complaints, and it
11 found the assailant had violated school policy. On these
12 facts, there is no case that has found deliberate indifference
13 under these circumstances, and so we ask Your Honor to dismiss.

14 **THE COURT:** Thank you, Ms. Everitt.

15 Mr. Zalkin, briefly.

16 **MR. ZALKIN:** Briefly.

17 The question really, Your Honor, is what is -- what does
18 it mean to be indifferent? Indifferent to who, to what? The
19 indifference is to the victim. And what I've heard here is
20 that there is a burden-shifting, that it's really incumbent on
21 the victim to proactively proceed, this person who, as you
22 acknowledge, is in a state of trauma, is in a state of
23 vulnerability. It's up to them to push and get information and
24 to see what's happening.

25 That is indifference, to do that and to put that burden on

1 the victims. And I think -- you know, you take the position
2 that there's something separate from a lack of communication to
3 being -- acting unreasonably, and I think it's a part of the
4 unreasonable conduct.

5 **THE COURT:** I don't disagree that if you could piece
6 together a number of actions, including ones that are listed in
7 the *Dear Colleague* letter, that rise to the level of deliberate
8 indifference plausibly, then you could go forward on those
9 claims. So that's the thing I will be looking for.

10 And I do understand all of the arguments that you've made,
11 so if you've got a new one, go ahead, but otherwise, you should
12 just wrap up.

13 **MR. ZALKIN:** I'm going to give you the pieces real
14 quickly, if you don't mind, at least on Ms. Karasek.

15 **THE COURT:** Okay.

16 **MR. ZALKIN:** The designated Title IX officer never
17 advised the victim of a requirement to file a formal complaint,
18 never conducted a formal investigation. She knew that an
19 informal investigation was not the appropriate way to go in
20 these types of cases, but she didn't -- she deliberately made
21 the decision not to.

22 No administrator communicated with the victim for two
23 months after receiving actual notice --

24 **THE COURT:** You've gone through this before,
25 Mr. Zalkin.

1 **MR. ZALKIN:** All right. I don't think there is much
2 more I can say, Your Honor.

3 **THE COURT:** Okay. I appreciate your argument. I will
4 go back and think about it one more time. I think we need to
5 have a case management conference to set the schedule for the
6 rest of the way, and so I'd like to do that on July 5th.

7 **MR. ZALKIN:** July 5th?

8 **THE COURT:** Are you available then?

9 **MR. ZALKIN:** Yes.

10 **MS. EVERITT:** That's fine here.

11 Two points of clarification.

12 **THE COURT:** Okay. Let me just tell you that I want to
13 have your CMC statement by June 30th. And what I want is a
14 schedule for your proposed schedule for the remainder of the
15 case.

16 **MR. ZALKIN:** July 5th at what time?

17 **THE COURT:** July 5th at 2:00.

18 **MR. ZALKIN:** Do you accept telephone appearance?

19 **THE COURT:** We can -- you're down in San Diego; right?

20 **MR. ZALKIN:** Yes.

21 **THE COURT:** Yes. You can appear by phone on this.

22 **MR. ZALKIN:** Thank you, Your Honor.

23 **MS. EVERITT:** Just two points of clarification for the
24 record.

25 Mr. Zalkin mentioned that the deliberate indifference

1 standard is deliberate indifference with respect to the victim,
2 not with respect to the assault, but that's incorrect if you
3 look at *Davis*. It's whether the school is deliberately
4 indifferent to the complaint.

5 **THE COURT:** I understand.

6 **MS. EVERITT:** The second point is with respect to
7 whether you look at the totality of the circumstances in terms
8 of determining whether there's been deliberate indifference,
9 and the Ninth Circuit and the Supreme Court has not held that
10 you can look at the totality of the circumstances or that you
11 look at sort of multiple things leading to a systemic showing
12 of deliberate indifference. But even if that were considered,
13 as Your Honor notes, here it does not rise to the level of
14 deliberate indifference.

15 **THE COURT:** Well, I don't know how else you look at
16 deliberate indifference besides looking at the entire conduct
17 and making a determination that way. But I appreciate your
18 argument. Thank you very much.

19

20 (Proceedings adjourned at 2:54 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Friday, July 1, 2016

Pamela A. Batalo

Pamela A. Batalo, CSR No. 3593, RMR, FCRR
U.S. Court Reporter